

Arriagada Herran (Migration) [2023] AATA 3705 (9 October 2023)

1.

2.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Diego Ignacio Arriagada Herran

REPRESENTATIVE: Mrs Ruth Mulhern (MARN: 1382243)

CASE NUMBER: 2202966

HOME AFFAIRS REFERENCE(S): BCC2021/1244189

MEMBER: George Hallwood

DATE: 9 October 2023

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 482 - Temporary Skill Shortage visa:

- Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

Statement made on 09 October 2023 at 11:50am

CATCHWORDS

MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482– Medium-term stream – Carpenter – reference from Mr Arriagada dated 12 May 2021 was not a bogus document – applicant did not provide false or misleading information in relation to the visa application – applicant satisfies PIC 4020 – decision under review remitted

LEGISLATION

Migration Act 1958, s 65
Migration Regulations 1994, Schedule 2, cl 482.217

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 15 February 2022 to refuse to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 15 June 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they found there was evidence that the applicant had given, or caused to be given, a bogus document or information that is false or misleading in a material particular in relation to the visa application.
5. The applicant appeared before the Tribunal on 4 October 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Carlos Arriagarda, Mr Herran's father, partner in and Executive Director of Betontek, Mr Herran's former employer.
6. The hearing took place with the assistance of an interpreter in the English and Spanish (South American) languages.
7. The applicant was represented in relation to the review.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 482.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The delegate noted in relation to Mr Herran's visa application that he sought a subclass 482 Temporary Skill Shortage visa in the Medium-term stream working in the position of Carpenter. The application dated 15 June 2021 states that the applicant worked as a Carpenter full-time with Betontek, Chile from 1 June 2012 to 29 February 2016 and refers to an attached CV and reference letter. The application also states that the applicant worked part-time as a carpenter for Brief Access (Melbourne) from 17 April 2020.
15. The reference / certificate of employment dated 12 May 2021 provided and translated describes Mr Herran's work as a carpenter with Betontek in Chile as was described in the visa application. The work performed included building the timber formwork and moulds to manufacture concrete products by building a series of complex prefabricated panels. The letter was signed by Carlos Arriagada - partner and executive director (who is also Mr Herran's father).
16. A reference dated 15 June 2021 from Brendan Reiffel, director of Brief Access Pty Ltd describes the work Mr Herran undertook working part-time as a carpenter for that company.
17. Mr Herran's undated CV contains employment details in accord with the visa application and provided references.
18. The delegate's reasons for visa refusal describes a number of inconsistencies with Mr Herran's application:
 - An employment integrity check by telephone found that Mr Herran had only been employed by Betontek for about a year, and that his work there involved managing logistics and the implementation of IT systems, not as a carpenter;

- As outlined in the Department's invitation to comment / natural justice letter of 22 December 2021 to Mr Herran, his previous student visa application had not contained any information about having carpentry employment experience;
 - The delegate found that the reference / certificate of employment dated 12 May 2021 was a bogus document and the application and CV contained false or misleading information that is material to the visa application.
 - A clarification letter from Mr Arriagada provided to the Department in January 2022 had indicated that he had not remembered to include the carpentry work when describing Mr Herran's duties because of the long time since Mr Herran had worked at Betontek, but the reference had described Mr Herran's position as a carpenter and was written by Mr Arriagada, his father, only eight months prior.
19. In response to the invitation to comment, the applicant obtained clarification in the form of a letter to the department from Mr Arriagada. The response letter states, inter alia:
- Mr Arriagada was driving a vehicle when called by the case officer undertaking the employment integrity check;
 - Mr Arriagada requested that he call back when he was back in his office with access to employment records in relation to his son, the applicant;
 - The case officer insisted on obtaining the details immediately;
 - When asked how long Mr Herran had worked for Betontek he had incorrectly answered about a year or a little more;
 - When asked about duties undertaken by his son he had replied that his son had worked on the building of computerised control systems for the running of the operations of the factory;
 - That he had omitted to inform the case officer of Mr Herran's duties as a carpenter;
 - That the omission was due to the five years that had elapsed since Mr Herran had worked at Betontek, the call from the case officer being unsolicited and while Mr Arriagada was driving, that he only described the duties undertook while sitting alongside Mr Herron, not the rest of his duties; and, that he was probably influenced by the fact that his son is a Computer Engineer by profession and it was that type of work he performed while working alongside Mr Herran.
20. At the hearing Mr Herran told the Tribunal that he had worked for Betontek as a carpenter although had spent up to two hours a day in the mornings helping Mr Arriagada to set up IT systems including the business web site and database. He had done this for about a year when he first started.
21. When asked by the Tribunal why he was working as a carpenter when his qualification was as a computer engineer, Mr Herran told the Tribunal that when he was half way through his degree he realised he did not wish to work as a computer engineer but his parents told him he should finish the qualification before starting work in his desired field. When he completed his qualification, he started work as a carpenter and only assisted Betontek with the IT side because it was his father's business.

22. Mr Herran's description of his duties at Betontek reflect those of the occupation of Carpenter - 331212. He told the Tribunal that his duties were as described in the reference dated 12 May 2021 and when asked by the Tribunal if any of his carpentry work involved computerised control systems Mr Herran answered "no".
23. Mr Arriagada's evidence was in accord with Mr Herran's evidence. When asked by the Tribunal why he had responded incorrectly to the department's questions he reiterated that the reasons he had provided in his response letter in 2021, mainly that the case officer had phoned him while he was driving between two meetings, the case officer had treated the call as though it was not of any importance but had insisted on getting the answers during this call, and that he had answered questions on the basis of the work Mr Herran had performed when they had worked together on the IT system, not the work he was doing as a carpenter.
24. During Mr Arriagada's evidence he mentioned a reference that was given to Mr Herran by his then manager at the time he left the company in 2016. The Tribunal asked Mr Arriagada what occupation was described in the reference and Mr Arriagada said the reference was for a carpenter and that it was for the period 1 June 2012 to 29 February 2016. When asked by the Tribunal if he had a copy of that reference he said that he had a copy and could send it to the Tribunal.
25. The Tribunal asked Mr Herran why he had not provided this contemporaneous reference. He answered that he was confident that he had provided it to his representative at the time of his application but was unaware of what had been provided to the Department.
26. Mr Herran requested two weeks in which to provide this further information translated into English. The Tribunal agreed to the request for extra time.
27. The Tribunal has now received the reference from Mr Miguel Munoz Labra, Plant Manager at Betontek dated 26 February 2016. Mr Herran also provided a reference dated 29 February 2016 from Mr Arriagada. Both references refer to Mr Herran's work as a carpenter over the period 1 June 2012 to 29 February 2016.
28. Based on the evidence discussed above, the Tribunal is satisfied that the reference from Mr Arriagada dated 12 May 2021 was not a bogus document as defined in s 5(1) and did not contain false or misleading information as defined in PIC 4020(5). While Mr Arriagada had provided information to the department's case officer, the Tribunal is satisfied that he was questioned at a time when he was distracted by his preparation for a meeting he was about to attend and felt unsafe while driving. His answers, he was led to believe, were of little or no importance and given the situation he provided answers he then believed were close enough to the truth to end the phone call. The Tribunal is satisfied that given the situation Mr Arriagada did not provide false or misleading information in relation to the visa application or a visa held in the 12 months before the visa application was made.
29. The Tribunal is satisfied that Mr Herran worked as a Carpenter - 331212 full time for Betontek from 1 June 2012 to 29 February 2016 for the purpose of meeting the work experience requirement of reg 482.212(3) in lieu of formal qualifications.
30. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

31. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is

granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

32. At the hearing Mr Herran told the Tribunal that neither he nor any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1). There is nothing before the Tribunal that suggests otherwise.
33. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

34. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
35. The Tribunal had file copies of the applicant's passport and other documents containing photographs of the applicant which together with the applicant's appearance via Teams satisfied the Tribunal as to his identity.
36. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

37. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
38. At the hearing Mr Herran told the Tribunal that neither he nor any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy the identity requirements in PIC 4020(2A). There is nothing before the Tribunal that suggests otherwise.
39. Therefore PIC 4020(2B) is met.

40. Concluding paragraph

41. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl 482.217.

DECISION

42. The Tribunal remits the application for a GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 482 - Temporary Skill Shortage visa:
 - Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

George Hallwood
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...